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IN THE

Supreme Court of the United States

No. .

THOMAS A. JOSEPH,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

May it please the court the petitioner, Thomas A. Joseph, citizen of Ohio and of the United States, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Ohio, the highest court of that state.

STATEMENT OF MATTER INVOLVED.

The grand jury of Franklin county, Ohio, presented an indictment containing fourteen counts charging petitioner with the offense of subornation of perjury, each count alleging in substance that petitioner had suborned a plaintiff in a divorce trial to testify falsely that he or she had been a bona fide resident of said Franklin county for thirty days immediately preceding the filing of the petition for divorce, said residence being a requisite to the court's jurisdiction. (R., 23-33)

The trial court dismissed five counts of said indictment for total failure of proof. (R., 35.) The jury returned a verdict of not guilty upon six of the remaining counts and a verdict of guilty on three counts. (R., 34.) The trial court sentenced the petitioner to the Ohio Penitentiary. (R., 37.)

The Court of Appeals of Franklin county, Ohio, reversed the judgment of the trial court upon two counts of the said three counts for total failure of proof, and affirmed the trial court on the remaining count, to wit, the ninth count of the indictment. (R., 37-44)

An appeal as a matter of right was lodged in the Supreme Court of Ohio, the court of last resort, to the judgment of the Court of Appeals on said ninth count (R., 3), based upon a denial of the rights of petitioner guaranteed him by the Constitution of the state of Ohio and the Constitution of the United States of America. (R., 3.) The errors here claimed were first raised in the trial court (R., 36, 38, 39, 40), and urged upon both the Court of Appeals (R., 89), and the Supreme Court of Ohio. (R., 3, 5, 9) The Supreme Court of Ohio held that no debatable constitu-

tional questions were involved (R., 2), and dismissed the appeal (R., 2); application for rehearing was filed, and said Supreme Court adhered to its previous decision and entered its final order on January 10, 1951. (R., 2, 3) In its opinion the Court of Appeals discussed question of "due process." (R., 22.)

JURISDICTION.

This court has jurisdiction of the questions here presented. Title 28, Section 1257, paragraph 3, U. S. C. A.

QUESTIONS PRESENTED.

1. May the trial judge communicate, converse and remain with the jury for an hour to an hour and a half after the case has been submitted to the jury and it has entered upon its secret deliberations? This without the knowledge or consent of the petitioner and in his absence? (R., 34.)

2. The petitioner was denied his right to be confronted by witnesses against him. May the findings, conclusions and judgment of a trial judge based upon the evidence in a civil action—to wit, for divorce—be introduced in evidence in a criminal case to establish beyond a reasonable doubt that plaintiff in divorce action testified that she had there testified that she had been a bona fide resident of the county for thirty days immediately preceding the filing of the divorce petition, the testimony of said plaintiff not being identified in said judgment, and more than one witness having testified in said civil action? (R., 42; Exhibit K-2; R., 39, 40; and statute.)

Said judgment in the divorce action was admitted in evidence in the case at bar—a criminal action—over the

objection of petitioner and without any limitation on its use by the jury. (R., 40.) The trial court on the contrary instructed the jury in instant case to use said judgment and findings of the trial court in the civil action in any way it saw fit. (R., 42.) With the exception of the plaintiff in the divorce action no other witnesses in that action were called to testify in the case at bar, nor was the trial judge in said civil action placed upon the witness stand in the instant cause.

3. Did the trial court grant effective assistance of counsel? The trial began on the ——— day of November, 1949 (R., —), and ended November 15, 1949. (R., —.) ——— witnesses testified. (R., —.) Approximately 136 exhibits were admitted in evidence. (R., 57.) The bill of exceptions covered 1200 pages. (R., 35.) Counsel requested at least two hours to argue the cause to the jury. The court arbitrarily denied this request and limited counsel's time to one and one-half hours. (R., 36.)

Grave and serious questions are here presented. If the law of Ohio here laid down by its Supreme Court is to govern Ohio trial courts in the future, then trial judges may secrete themselves with a jury after it has begun its deliberations, converse and communicate with it, without the knowledge or consent of an accused or his counsel, and in their absence, and such proceeding of the trial court and jury be prevented from being made a matter of record in a cause. Unless this court holds otherwise, the law of Ohio as announced in this cause may well be urged upon jurisdictions in other states and may well lead to grave abuses in the administration of justice and denials to litigants of their rights, particularly under the Fourteenth Amendment to the Constitution of the United States.

Here is presented an example of an improper introduction of an exhibit to be used by a jury to determine an issue of proof beyond a reasonable doubt and without the jury or the accused being confronted by witnesses upon whose testimony the conclusions of fact were reached by a court in another cause.

Assistance of counsel goes to the substance of a judicial proceeding, and such counsel should be accorded full opportunity and liberal time to present his client's cause to a jury in final argument.

It was well said by this court in the case of **Fillipon v. Albion**, 250 U. S., 76, at p. 81:

> "We entertain no doubt that the orderly conduct of a trial by jury essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose **to be present in person or by counsel at all proceedings from the time the jury is impanelled until it is discharged after rendering the verdict.**" (Emphasis added.)

A decision in this case should determine whether the powers here exercised by the courts of Ohio should be exercised by state courts generally.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Supreme Court of Ohio, Columbus, Ohio, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Supreme Court had in the case numbered and entitled on its docket, Number 32398, Thomas A. Joseph, defendant-appellant, v. The State of Ohio, plaintiff-appellee, to the end that this cause may be reviewed and determined by this court as provided for by the Constitution and statutes of the United

States; and that the judgment herein of said Supreme Court of Ohio be reversed by this court, and for such further relief as this court may deem proper.

Dated April 7, 1951.

Respectfully submitted,

PAUL M. HERBERT,
Attorney for Petitioner.

BRIEF OF PETITIONER.

The petition for writ of certiorari sets out in three separate instances denials by the highest court of Ohio, of privileges and immunities guaranteed petitioner by the Constitution of the United States, thereby bringing this cause within the jurisdiction of the Supreme Court of the United States according to the provisions of Title 28, Section 1257, paragraph 3, enacted June 25, 1948. U. S. C. A.

Objections and exceptions to the rulings of the trial court are found in the record on pages 3 to 4. The assignment of errors to the Court of Appeals of Franklin county, Ohio, are found in the record on pages 7 to 10. The assignment of errors to the Supreme Court of Ohio and its rulings are found in the record at pages 5 to 6, 7. Denial of the application for rehearing in said court is found in the record at page 23

In this brief the questions set out in the petition for the writ will be considered in the order in which they there appear.

Question No. 1. (Petition, page 3.) After the case had been submitted to the jury and it had entered upon its deliberations in secret and had deliberated about two hours, it was taken to a private dining room at a hotel for dinner. (R., 36.) The trial judge, without the knowledge or consent of the petitioner or his counsel and in their absence accompanied the jury, ate and conversed with it. (R., 36.) The Court of Appeals of Franklin county in discussing "due process" held that such a proceeding, though "unprecedented" and "unusual" did not deny petitioner "due process". It held that petitioner must show affirmatively that he was prejudiced by this unusual proceeding. This

was asking the impossible, as petitioner was made powerless to have a record of the communications between judge and jury during the period. The contention of the Court of Appeals of Franklin county, Ohio, was well answered in **Fina v. United States**, 46 Fed. (2d), 643, at p. 644, and authorities cited.

It is now the law of Ohio that a trial judge may meet with the jury, after it has entered upon its deliberations, converse and communicate with it, all without the knowledge, consent or presence of the accused person or his counsel. The law, as now laid down in Ohio may, unless this court directs otherwise, be cited as authority to the courts of other states, and, indirectly at least, with the approval of the Supreme Court of the United States. It is difficult to imagine or conceive the judicial chaos that may well result, the violence that may be done to fair, even, equal distributive justice and the abuses that may and probably will invade the administration of justice. The law as laid down in this cause by the courts of Ohio is against the overwhelming authority of both state and federal courts.

Abbott v. Hockenberger, 65 N. Y. Supp., 566; **Crabtree v. Hagenbaugh**, 233 Ill., 349; **Danes v. Pearson**, 6 Ind. App., 465; **Diaz v. United States**, 223 U. S., 442; **Ducate v. Brighton**, 133 Wis., 628, 637; **Fillipon v. Albion Vein Slate Company**, 250 U. S., 76, syllabus, pp. 81-82; **Fina v. United States**, 46 Fed. (2d), 643, syllabus, pp. 643-644; **Galloway v. Corbett**, 52 Mich., 460; **Havenor v. State**, 125 Wis., 444; **High v. Chick**, 30 N. Y. Supp., 652; **Hoberg v. State**, 3 Minn., 262; **Hudson v. Stearns**, 75 N. Y. Supp., 735; **Hurst v. Webster Mfg. Company**, 128 Wis., 342; **Jenss v. Everett**, 166 N. Y. Supp., 958; **Kehrly v. Schaeffer**, 36 N. Y. Supp., 510; **Miller v. United States**, 120 Fed. (2d), 968, syllabus

14; **O. M. v. Fisher**, 226 Pa., 189; **Read v. City of Cambridge**, 124 Mass., 567, 568-9; **Sargent v. Roberts**, 29 N. Y. Supp., 560; **Stager v. Harrington**, 27 Kans., 414; **State v. Wroth**, 15 Wash., 621; and **Valentine v. Kelly**, 54 Hun., 78.

Question No. 2. (Petition, page 3.)

Exhibit K-2 was a finding and decree of the trial court in the divorce action set out in the ninth count of the indictment. (R., 37.) Among other findings the trial court found in said exhibit "on the evidence" that plaintiff at the time of filing her petition "was a bona fide resident of the county of Franklin". (R., 39.) This exhibit was admitted in evidence over petitioner's objection to be used by the jury to establish beyond a reasonable doubt the required proof that plaintiff in divorce action was suborned to and did testify falsely at the divorce trial that she was a bona fide resident of Franklin county for thirty days immediately preceding the filing of her petition. (R., 39; Ohio statute, R., 35.) More than one witness is required under Ohio laws to present evidence sufficient to warrant a divorce. (Statute of Ohio, R., 38.) The trial court in the case at bar when it admitted Exhibit K-2 in evidence did not limit its use by the jury, but on the contrary instructed the jury to use it in any way that it saw fit with regard to the indictment. (R., 42.) The court in the civil action in its findings in Exhibit K-2 did not name or specify any witness, nor refer to the testimony of any witness in support of its findings, but based its conclusions upon all of the evidence presented by all of the witnesses appearing in the cause. The trial court did not testify nor were any of the witnesses in the divorce action called to testify in the case at bar except plaintiff. In any case in any court an accused is entitled to be confronted with the witnesses against him. Here was a denial of that right and a denial of the

guaranties granted petitioner under the Fifth and Fourteenth Amendments to the Constitution of the United States. **22 Am. and Eng. Ency. of Law**, page 962; **Fresh v. Gilson et al.**, 41 U. S., 327, syl., 2; **Kirby v. United States**, 174 U. S., 47, syl., page 60; **Gee v. State**, 60 Ohio St., 485; **Miller v. United States**, 120 Fed. (2d), 968; **Motes v. United States**, 178 U. S., 458, syl., 4, page 471; **Mutual Ben. L. Ins. Company v. Tisdale**, 91 U. S., 238, syl., pages 244, 245, and 246; **People v. Lee Fat**, 54 Cal., 527; **People v. Hearmes**, 168 Pac., 44, sixth headnote; **People v. Macard**, 109 Mich., 623; **Shepard v. United States**, 290 U. S., 96; **Smith v. State**, 103 Ala., 57; **State v. Blaisdell**, 59 N. H., 328; **State v. Farrell**, 223 N. C., 321, syl., 3; **United States v. Barracota**, 45 Fed. Supp., 38, syl., 2; and **Waldron v. Waldron**, 156 U. S., 361.

Waldron v. Waldron, 156 U. S., 361, is worthy of emphasis. It was an action for alienation of affections in the courts of Indiana following an action for divorce. The trial court, in the alienation action, admitted in evidence the judgment in the divorce action, limiting the jury's use thereof solely for the purpose of proving the divorce. Counsel, however, argued other matters in said judgment decree to the jury. This was held prejudicial error. In the case at bar, the trial court did precisely what offending counsel did in the **Waldron** case. It admitted in evidence the judgment of the court in the divorce action, Exhibit K-2, and it instructed the jury to use it without any limitations whatever. (R., 42.)

Question 3. (Petition, page 4.)

This was a long trial covering over two weeks. ——— witnesses testified. Over 135 exhibits were admitted in evidence. The bill of exceptions contained over twelve hundred pages. Nine counts of the indictment, each carrying over one year's imprisonment in the penitentiary upon a

verdict of guilty were to be argued by counsel to the jury. Ninety minutes was allowed petitioner's counsel to argue the cause to the jury. This was ten minutes per count. Counsel requested a minimum of two hours—a very reasonable request. The trial court arbitrarily fixed one and one-half hours for final argument. (R., 34.) Petitioner was denied effective assistance of counsel.

Former decisions of the Supreme Court of Ohio held this to be an abuse of discretion by a trial court and contrary to constitutional rights of an accused. **Dille v. State**, 34 Ohio St., 617, syllabus; **Weaver v. State**, 24 Ohio St., 584, syllabus, page 587. The decision of the Supreme Court of Ohio in the case at bar did not overrule the law announced in the above cases, and this rule is still the law of Ohio. The exception was apparently made of the petitioner, thereby denying him distributive justice. See also **53 American Jurisprudence**, p. 364, Sec. 461; **Childers v. Con**, 161 Ky., 440; **People v. Green**, 99 Cal., 564, syllabus; **State v. Balenger**, 202 S. C., 155; **State v. Cash**, 138 S. C., 167; **Wingo v. State**, 62 Miss., 311, syllabus.

SUMMARY.

This brief consists of 5 printed pages, setting out three propositions, each followed by citations of authorities. The federal questions involved are stated, the jurisdiction of this court set out, arguments as to errors in the judgments of the courts of Ohio, and the importance of the questions involved are emphasized.

For the reasons urged, therefore, it is respectfully submitted that the certiorari prayed for should be granted.

Respectfully submitted,

PAUL M. HERBERT,
Attorney for Petitioner.